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Nicholas Lamarr v. Utah State Department of Transportation and Salt Lake City : Brief of Appellant

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

NICHOLAS LAMARR, Plaintiff/Appellant, vs.	:	Case No. [redacted]
UTAH STATE DEPARTMENT OF TRANSPORTATION and SALT LAKE CITY, Defendants/Appellees.	:	Category 16 91-0600-CA

BRIEF OF APPELLANT

APPEAL FROM THE JUDGMENT OF THE THIRD JUDICIAL DISTRICT COURT
OF SALT LAKE COUNTY, STATE OF UTAH
THE HONORABLE HOMER F. WILKINSON PRESIDING

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STANDARD OF REVIEW

This is an appeal from the trial court's granting summary judgment in favor of the City and UDOT. In deciding whether the trial court properly granted summary judgment, the Supreme Court gives no deference to the trial court's view of the law. The Supreme Court reviews the trial court's conclusions for correctness. Ron Case Roofing and Asphalt Paving, Inc. v. Bloomquist, 773 P.2d 1152 (Utah 1989); Kelson v. Salt Lake County, 784 P.2d 1152 (Utah 1989).

The plaintiff/appellant, Nicholas Lamarr, pursuant to Rule 24(a) of the Utah Rules of Appellate Procedure, submits the following Brief.

JURISDICTION

This Court has jurisdiction to decide this appeal pursuant to Utah Code Ann. § 78-2-2(3)(j). This is an appeal from a final Order of Dismissal of the Third Judicial District Court in and for Salt Lake County, State of Utah, the Honorable Homer F. Wilkinson presiding. The Order of Dismissal entered by the trial court granted summary judgment in favor the defendants Utah State Department of Transportation and Salt Lake City and dismissed the plaintiff's complaint against both the defendants with prejudice.

STATEMENT OF ISSUES

The following issues are presented to this Court for review.

1. Did the trial court err in concluding that the defendant Salt Lake City owed no general duty to the plaintiff for the construction, maintenance and/or signing of the North Temple Overpass?

2. Did the trial court err in concluding that the defendant Salt Lake City owed no private duty to the plaintiff for controlling the transient population under the North Temple Overpass?

3. Did the trial court err in concluding that the conduct of the defendants Salt Lake City and Utah State Department

of Transportation was not a proximate cause of the plaintiff's injuries?

4. Did the trial court err in concluding that any duty of the defendant Salt Lake City to control the transient population under the North Temple Overpass is an immune discretionary function under Utah Code Ann. § 63-30-10(1)(a)? May Lamarr pursue this claim against the City even if transient control is an immune discretionary function?

DETERMINATIVE CONSTITUTIONAL AND STATUTORY AUTHORITY

The interpretation of the following statutory provisions is determinative of certain issues on appeal. The language of these statutes is set out in the Addendum to this Brief pursuant to Rule 24(f)(2) of the Utah Rules of Appellate Procedure.

Utah Code Ann. § 27-14-2 (1987);

Utah Code Ann. § 27-14-4 (1987);

Utah Code Ann. § 63-30-4 (1987);

Utah Code Ann. § 63-30-8 (1987);

Utah Code Ann. § 63-30-9 (1987);

Utah Code Ann. § 63-30-10(1)(a) (1987).

STATEMENT OF THE CASE

A. Nature of the Case.

This is a negligence action brought by Nicholas Lamarr against Salt Lake City ("City") and Utah State Department of Transportation ("UDOT"), alleging that the City and UDOT were negligent in, among other things, failing to properly construct,

maintain and/or sign the North Temple Overpass ("Overpass") and for failing to properly control the transient population underneath the Overpass.

B. Course of Proceedings.

After some discovery was conducted at the trial court level, the City moved for summary judgment on the following four grounds (R. 144-152).

1. That the City owed no general duty to the plaintiff for the construction, maintenance and/or signing of the Overpass;

2. That the City owed no private duty to the plaintiff for transient control;

3. That the plaintiff failed to establish that the conduct of the City was a proximate cause of the plaintiff's injuries;

4. That highway maintenance and police activities are immune discretionary functions under Utah Code Ann. § 63-30-10(1)(a).

UDOT filed a Supplemental Motion for Summary Judgment, joining the City in ground 3 and part of ground 4, the proximate cause and highway maintenance discretionary function issues. (R. 156-157).

After briefing and oral argument, the trial court granted summary judgment in favor of both the City and UDOT. (R. 287-290). The trial court concluded that:

1. The defendant Salt Lake City owed no general duty to the plaintiff for the construction, maintenance or signing of the North Temple Overpass;

2. The defendant Salt Lake City owed no private duty to the plaintiff for controlling the transient population under the North Temple Overpass;

3. The conduct of the defendants Salt Lake City and UDOT was not a proximate cause of the plaintiff's injuries;

4. Any duty of the defendant Salt Lake City to control the transient population under the North Temple Overpass is an immune discretionary function under Utah Code Ann. § 63-30-10(1)(a); and

5. The construction, maintenance and signing of the North Temple Overpass is not an immune discretionary function under Utah Code Ann. § 63-30-10(1)(a).

Based on these conclusions of law, the trial court dismissed the plaintiff's complaint against the City and UDOT with prejudice. The plaintiff appeals that order of dismissal.

C. Statement of Facts.

1. On April 18, 1987, Nicholas Lamarr, was visiting Salt Lake City from Wyoming. At approximately 10:30 p.m., Lamarr was walking east across the North Temple Overpass ("Overpass). (R. 3).

2. At that time, Lamarr was struck by a car going west driven by Stanley Cross. The Cross car was forced into Lamarr by a car driven by Don Ainsworth. (R. 3).

3. As a result of being hit by the Cross car, Lamarr was thrown over the side of the Overpass and fell to the ground below, suffering serious and permanent personal injuries, including,but not limited to, fractures of the left fibula and left tibia, fractures of the right femur, and extensive right knee damage requiring multiple surgeries. (R. 3, 6).

4. On the night of the accident, before the accident, Lamarr had walked from east to west across the Overpass, using the pedestrian walkway located on the south side of the Overpass. That pedestrian walkway extends halfway across the Overpass and, from there, steps lead pedestrians to the ground underneath the Overpass. (R. 3).

5. Transients commonly congregate under the North Temple Overpass. (R. 3).

6. Lamarr was frightened and harassed by transients as he left the pedestrian walkway, went down the stairs and ended up underneath the Overpass. (R. 3, 4).

7. After getting something to eat at a restaurant on the westside of the Overpass, Lamarr started back to his hotel, which was located on the east side of the Overpass. (R. 4).

8. To avoid the threats, harassment and possible physical violence presented by the transients congregated around the pedestrian walkway stairway located underneath the Overpass, Lamarr began to cross the Overpass itself, walking east on the left side of the roadway. (R. 4).

9. There are no signs or other traffic control devices on, or adjacent to, the Overpass prohibiting or regulating pedestrian traffic on the Overpass, nor is there an alternative route for pedestrians to take, other than walking many blocks around the Overpass. (R. 4).

10. While walking on the Overpass, Lamarr was involved in the accident and suffered the injuries mentioned above.

SUMMARY OF ARGUMENT

The City has a general duty to construct and/or maintain pedestrian safety devices on and adjacent to the North Temple Overpass. Utah Code Ann. § 27-14-2 and Utah Code Ann. § 27-14-4 provide that the City shares responsibility with UDOT and may be liable for the failure to maintain and/or construct such pedestrian safety control devices. Salt Lake City raised this general duty issue in a motion for summary judgment twice in the trial court. The first time, after reviewing the memoranda filed and hearing oral argument on that issue, the trial court denied the City's motion for summary judgment. When the City raised the issue a second time, no new evidence was submitted in support of the renewed motion for summary judgment. Under the "law of the case" doctrine, the trial court should have refused to reconsider arguments already presented to and decided by that court. Salt Lake City Corp. v. James Constructors Inc., 761 P.2d 42 (Utah Ct. App. 1988).

The public/private duty doctrine does not apply to this case. The doctrine is also known as the "duty to all - duty to no

one" doctrine. It provides for an injured person to recovery against a municipality, the injured person must, generally, show a breach of duty owed to him as an individual and not merely the breach of an obligation owed to the public generally. When immunity from suit is waived by statute, as it is in this case, the governmental entity is treated as an individual and the "public duty" doctrine does not apply. Adams v. State, 555 P.2d 235 (Alaska 1976). Further, the "public duty" doctrine directly conflicts with the Utah Governmental Immunity Act. The Utah legislature has specifically waived immunity from suit in this case. To adopt the "public duty" doctrine to shield the defendant from liability, when the Legislature has specifically abolished immunity in such cases, is the improper judicial repeal of a legislative act. Brennan v. Eugene, 285 Or. 401, 591 P.2d 719 (1979). The "public duty" doctrine does not apply to a statute which is designed to benefit a particular and circumscribed class of persons within the general population. Baerlein v. State, 92 Wash. 2d 229, 595 P.2d 930 (1979). Lamarr argues that the statutes allowing the City and UDOT to be sued for defective and dangerous conditions of state highways is a statute specifically designed to protect individuals like Lamarr, injured by the defective and unsafe condition of public highways and structures. That is a circumscribed group within the general population and, therefore, the "public duty" doctrine does not apply. Finally, the public duty doctrine does not apply to this case because the duty relied on by Lamarr is the City's nondelegable common law duty to all

users of the City's streets, to keep its streets in a reasonable safe condition.

Proximate cause is a question of fact to be decided by the jury. Apache Tank Lines, Inc. v. Cheney, 706 P.2d 614 (Utah 1985). The trial court improperly concluded, as a matter of law, that the conduct of the City and UDOT was not a proximate cause of the plaintiff's injuries. There may be more than one proximate cause of an injury. Hall v. Blackham, 18 Utah 2d 164, 417 P.2d 664 (1966). An intervening negligent act, in this case, Cross being forced into the plaintiff, does not automatically become a superseding cause which relieves the original actor of liability. Godesky v. Provo City Corporation, 690 P.2d 541 (Utah 1984). These are jury questions.

Police activities, specifically transient control in this case, are not immune discretionary functions under Utah Code Ann. § 63-30-10(1)(a). The City's argument that this case involves "police activities" is inconsistent with the plaintiff's theory in this case. The plaintiff argues that the failure to control or otherwise manage the transient population under the North Temple Overpass made the Overpass defective and dangerous under Utah Code Ann. § 63-30-8 and Utah Code Ann. § 63-30-9. As such, immunity from suit has been waived. Where immunity from suit has been waived, "the discretionary function" exception of Utah Code Ann. § 63-30-10(1)(a) cannot be used to modify or supersede that waiver of immunity. Sanford v. University of Utah, 26 Utah 2d 295 488 P.2d 745 (1971). Finally, the City's failure to control or otherwise

manage the transients under the Overpass was a breach of its common law duty to all users of the Overpass and that duty cannot be avoided by alleging that transient control is discretionary. Schmeck v. City of Shawnee, 651 P.2d 585 (Kan. 1982).

ARGUMENT

POINT I

THE CITY'S MOTION FOR SUMMARY JUDGMENT ON GENERAL DUTY WAS PREVIOUSLY DENIED BY THE TRIAL COURT AND WAS IMPROPERLY RECONSIDERED

In its second summary judgment motion, dated August 10, 1990, the City argued that it has no general duty regarding the maintenance of signs or other pedestrian control markers on the Overpass because North Temple is a state highway under UDOT's jurisdiction. (R. 144-45).

That identical argument was raised by the City back in June of 1988 in a "Motion for Summary Judgment and for Rule 11 URCP Sanctions". In that initial motion, the City made the same argument it later raised, that it has no responsibility for North Temple and, therefore, has no duty to the plaintiff. (R. 16-18). In opposition to that initial motion and on appeal, Lamarr argues that state statutes assign responsibility to the City as well as to UDOT for the maintenance of pedestrian safety devices on and adjacent to state highways. (R. 37-42). Utah Code Ann. § 27-14-2, provides in part, as follows:

> The legislature recognizes that adequate sidewalks and pedestrian safety devices are essential to the general welfare of the citizens of the state. . . . The legislature deems it to be in the best interest of the state if pedestrian safety construction is to

> be performed on state highways, that it be performed under the direction of the counties and participating cities pursuant to rules and regulations of the State Department of Transportation developed in cooperation with the counties and cities.

Utah Code Ann. § 27-14-2 further explains the responsibilities of the City and UDOT regarding state highways as follows:

> Notwithstanding any other provision of law, counties and participating cities may construct and maintain curbs, gutters, sidewalk and pedestrian safety devices adjacent to the traveled portion of state highways upon easements that may be granted by the State Department of Transportation. The State Department of Transportation shall cooperate with counties and participating cities to accomplish pedestrian safety construction and maintenance.

"Pedestrian safety devices" are defined in the statute to mean any device or method designed to foster the safety of pedestrian traffic. Utah Code Ann. § 27-14-3(4). The plaintiff has alleged in his complaint that the pedestrian safety devices on the Overpass were inadequate and were a proximate cause of his injuries. (R. 5).

In response to the City's first motion for summary judgment on this issue, the plaintiff argued that these statutes make it clear that the City and UDOT share responsibility for maintaining appropriate pedestrian safety devices on and adjacent to the Overpass and that jury should be allowed to determine the degree of responsibility to be allocated to each governmental entity. (R. 39).

After reviewing the memoranda filed and hearing oral argument on these issues, the trial court denied the City's first Motion for Summary Judgment on that general duty issue. (R. 46-48). The

City's renewed August 10, 1990 motion was nothing more than an attempt to have the trial court reconsider its previous ruling on the identical issue. No new evidence was submitted by the City in support of that renewed motion. Under the "law of the case" doctrine, a trial court properly refuses to reconsider arguments already presented to and decided by that court. Salt Lake City Corp. v. James Constructors, Inc., 761 P.d 42 (Utah Ct. App. 1988). As stated in that case:

> The law of the case doctrine is particularly applicable when, in the case of summary judgment, a subsequent motion fails to present the case in a different light such as when no new material evidence is introduced.

Id. at 45.

Such was the case here. Granting summary judgment on the City's general duty to construct and/or maintain pedestrian safety devices was improper both substantively and procedurally. That issue should be remanded to the trial court for a jury's determination.

POINT II

> THE PUBLIC DUTY DOCTRINE DOES NOT APPLY WHERE, AS HERE, IMMUNITY FROM SUIT HAS BEEN WAIVED BY STATUTE. EVEN IF APPLICABLE, THERE IS AN EXCEPTION TO THE PUBLIC DUTY DOCTRINE WHICH APPLIES TO THIS CASE.

The City argues that it owes no private duty to the plaintiff for controlling the transient population under the Overpass. The City's argument is based on the "public duty" doctrine, also known as the "duty to all - duty to no-one" doctrine. That doctrine was addressed by this Court in Ferree v. State of Utah, 748 P.2d 147

(Utah 1989). The doctrine provides that in order for an injured person to recover against a municipality, he must generally show a breach of duty owed to him as an individual and not merely the breach of an obligation owed to the general public. 18 McQuillin, Municipal Corporations § 53.04(b) (3rd rev. ed. 1977).

The public duty doctrine has no application where governmental immunity has specifically been waived by statute. The plaintiff's theory in this case is that the City's failure to control the transient population under the Overpass created a "defective, unsafe or dangerous condition" of a highway bridge, viaduct or other structure under Utah Code Ann. § 63-30-8 and created a "dangerous or defective condition" of a public structure under Utah Code Ann. § 63-30-9. Immunity from suit for that conduct is specifically waived under those statutes.

Utah Code Ann § 63-30-8 ("Section 8") provides:

> Immunity from suit of all governmental entities is waived for any injury caused by a defective, unsafe, or dangerous condition of any highway, road, street, alley, crosswalk, sidewalk, culvert, tunnel, bridge, viaduct, or other structure located thereon.

Utah Code Ann. § 63-30-9, ("Section 9") provides:

> Immunity from suit of all governmental entities is waived for any injury caused from a dangerous or defective condition of any public building, structure, dam, reservoir or other public improvement. Immunity is not waived for latent defective conditions.

Utah Code Ann. § 63-30-4 (Section 4") provides:

> Nothing contained in this act, unless specifically provided, is to be construed as an admission or denial of responsibility insofar as governmental entitles are

> concerned. Wherein immunity from suit is waived by this act, consent to be sued is determined as if the entity were a private person. (Emphasis added.)

Immunity from suit has been waived on the plaintiff's claims against the City under Section 8 and Section 9. Liability against the City must, therefore, be determined under Section 4 as if the City were a private person. The public duty defense is not available to an individual. That concept was explained by the Alaska Supreme Court in Adams v. State, 555 P.2d 235 (Alaska 1976). In Adams, the plaintiffs sued the state for failing to follow-up on fire hazard inspections:

> Thus, if the defendant were considered a private entity, its duty to the plaintiffs or their decedents would be clear. In fact, such a duty owed by a private investigator to those injured as a result of a negligent inspection has already been recognized. Hill v. USF&G, 428 F.2d 112 (5th Cir. 1970).
>
> An application of the public duty doctrine here would result in finding no duty owed to the plaintiffs or their decedents by the State, because although they were foreseeable victims and a private defendant would have owed such a duty, no "special relationship" between the parties existed. Why should the establishment of duty become more difficult when the State is the defendant? Where there is no immunity, the State is to be treated like a private litigant. To allow the public duty doctrine to disturb this equality would create immunity where the legislature has not. (Emphasis added.)

Id. at 2411-42.

The "public duty" doctrine also directly conflicts with the Utah Governmental Immunity Act in this case. The common law public duty doctrine cannot stand in the face of legislation to the

contrary. As stated by this Court in Hansen v. Utah State Retirement Board, 652 P.2d 1332, 1337 (Utah 1982), "of course, where a conflict arises between the common law and a statute or constitutional law, the common law must yield." As just mentioned, Sections 8 and 9 specifically waive immunity of the City in this case. For the trial court to conclude, as it did, that the City is immune from suit on a "public duty" defense is directly contrary to the legislative determination that the City's immunity in this case is waived.

As stated by the Oregon Supreme Court, the "duty to all - duty to no one" doctrine is, in reality, a form of sovereign immunity. To adopt such a doctrine in a case where the Legislature has abolished immunity is the improper judicial repeal of a legislative act. As explained in Brennen v. Eugene, 285 Or. 401, 591 P.2d 719, 725 (1979):

> We conclude that any distinction between "public" and "private" duty is precluded by statute in this State. [citing Governmental Immunity Act]. . .In abolishing governmental tort immunity, the Legislature specifically provided for certain exceptions under which immunity would be retained, and we find no warrant for judicially engrafting an additional exception onto the statute.

That position was further explained by the Arizona Court of Appeals in Bill Moore Motor Homes, Inc. v. State, 192 Ariz. 189, 629 P.2d 1025, 1029 n.4 (1981):

> In our view, the dichotomy of public versus private duty has created more problems that it has solved . . . [w]e think that the public-private duty dichotomy is a shield very much like the shield of governmental immunity. . . . It makes no difference whether we call the

> remaining shield "no duty" or governmental immunity.

For the reasons just mentioned, the public duty doctrine does not apply to this case. If this Court concludes, however, that the public duty doctrine applies to this case, there is an "exception" to the public duty doctrine which also applies. If a statute evidences a clear intent to identify and protect a particular and circumscribed class of persons within the general public, a tort action may be brought for the violation of that statute. Champagne v. Spokane Humane Society, 47 Wash. App. 887, 737 P.2d 1279 (1987). This "exception" to the public duty doctrine was explained in Baerlein v. State, 92 Wash.2d 229, 595 P.2d 930, 932 (1979):

> Obviously a statute which by its terms creates a duty to individuals can be the basis for negligence action where the statute is violated and the injured plaintiffs was one of the persons designed to be protected by the legislation. A clear statement of legislative intent to protect individuals does not need an "exception" to the traditional rule; it is simply a statutory duty imposed on the governmental entity . . . if the legislation evidences a clear intent to identify a particular and circumscribed class of persons, such person may bring an action in tort for violation of the statute or ordinance.

This "exception" to the traditional "public duty" rule was accepted by this Court in Little v. Utah State Division of Family Services, 667 P.2d 49 (Utah 1983). In Little, the plaintiffs brought a wrongful death claim against the State for the death of their autistic infant daughter. The plaintiffs claimed that the State was negligent in failing to evaluate the foster home in which the infant was placed, failing to supervise the infant's placement

and failing to protect the infant from harm. In affirming judgment against the State, this Court held:

> The statute specifically includes a duty to protect the child . . . we therefore hold that the protection of law well extended to the interests the plaintiffs here seek to vindicate.

Lamarr argues that Sections 8 and 9 of the Utah Governmental Immunity Act evidence an intent to protect a circumscribed group within the general population: those individuals injured by defective, unsafe or dangerous conditions of highways, public structures and their appurtenances. Where statutory language is plain and unambiguous, a court determining legislative intent will not look beyond the language of the statute to divine legislative intent. Brinkerhoff v. Forsyth, 779 P.2d 685 (Utah 1989). Sections 8 and 9 are unambiguous in waiving immunity from suit of governmental entities for any injury caused by dangerous, unsafe, or defective highways, sidewalks, bridges, viaducts and other public structures. The clear legislative intent is to allow those individuals injured by such dangerous, unsafe, or defective conditions to pursue claims against responsible governmental entities for those injuries. Those individuals are a circumscribed group within the general population. The public duty defense does not apply.

Finally, Lamarr argues that the duty of the City which has been breached is its common law duty owed to all users of city streets to keep the streets reasonably safe for travel. This duty has been established by this Court in many cases.

A city is charged with a nondelegable duty to exercise due care in maintaining the streets and sidewalks within its corporate boundaries in a reasonably safe condition and may incur tort liability for that failure under Section 8. Bowen v. Riverton City, 656 P.2d 434 (Utah 1982); Murray v. Ogden City, 548 P 2d. 896 (Utah 1976). It is a primary duty of a city to exercise reasonable care to maintain its streets in reasonable safe condition and to guard against injury to individuals by removing or making reasonably safe any dangerous object in or on the streets. Morris v. Salt Lake City, 35 Utah 474, 101 P. 373 (1909). It is not necessary that the dangerous condition be an actual defect in the road surface or structure itself. "If the condition is such that it affects the street to the extent that it is not reasonably safe for its intended uses, a defective street condition exists." Grantham v. City of Topeka, 196 Kan. 393, 411 P.2d 634, 640 (1966). Lamarr argues that the transient population under the Overpass made the roadway and surrounding public structure unsafe for intended purposes.

Police activity, like controlling transients, taken in isolation, may raise public duty arguments. However, when these same actions should be taken to comply with the City's duty to keep the streets safe, the public duty defense must fail. The best example of this argument is Lowman v. City of Mesa, 125 Ariz. 590, 611 P.2d 943 (1980).

In Lowman, the plaintiff sued the City of Mesa for personal injuries sustained when the plaintiff hit an unattended car on the

road. The plaintiff claimed the City was negligent for failing to remove the stalled car from the roadway. The sole issue on appeal was whether a municipality can be liable for its failure to remove a stalled vehicle from its streets. The City contended that "any duty to remove the stalled vehicle was one owed only to the public at large and not to any individual." Id. at 945. After reviewing the history of the public duty doctrine, the Arizona Court of Appeals, reversing summary judgment for the City, concluded:

> In this case, the Mesa City Code §10-3-29(A)(3) authorizes the city police to remove unattended vehicles the presence of which constitutes a hazard. Any duty of the police by virtue of the code to remove such a vehicle is one owed to the public generally and the failure of the police to remove a vehicle in violation of this duty would not ordinarily give rise to liability to a member of the public injured by the failure to remove it. However, the city has a common law duty owed to all users of city streets to keep them reasonably safe for travel and to warn the users of any actual dangers known to the city or which should be known to the city in the exercise of reasonable care. It is an alleged breach of this duty which appellant is entitled to have considered by the trier of fact. (Emphasis in original).

As in Lowman, the City in this case may be statutorily empowered to control transients. Lamarr's theory is that the City's failure to control the transient population made the Overpass unreasonably dangerous for travel. The City had knowledge of the problems created by the transient problem under the Overpass before Lamarr's accident happened. (Deposition of Norman C. Thompson, pages 6-7). As such, the City breached its common law

duty owed to Lamarr and all city street users, regardless of any public duty doctrine.

The trial court improperly granted the City's Motion for Summary Judgment on the public duty issue.

POINT III

PROXIMATE CAUSATION IS A QUESTION FOR THE JURY

In its Supplemental Motion for Summary Judgment, UDOT joined the City on two grounds: 1) that UDOT's conduct was not a proximate cause of Lamarr's injuries, and 2) that highway maintenance is an immune discretionary function under Utah Code Ann. § 63-30-10(1)(a). The trial court concluded that highway maintenance is not an immune discretionary function under Utah Code Ann. § 63-30-10(1)(a), but concluded, as a matter of law, that UDOT's conduct was not a proximate cause of the plaintiff's injuries. Therefore, the only issue on appeal, as to UDOT, is whether UDOT's conduct in the construction, maintenance, and/or signing of the Overpass was not, as a matter of law, a proximate cause of Lamarr's injuries. Regardless of how this Court determines the other issues on appeal, this proximate cause issue must, therefore, be decided.

The City and UDOT argued, and the trial court concluded, that they were entitled to summary judgment on proximate causation. The trial court's conclusion was error. This Court need give no deference to the trial court's legal conclusions. Such conclusions are reviewed de novo for legal correctness. Kelson v. Salt Lake County, 784 P.2d 1152 (Utah 1989). This Court has consistently

held that there may be more than one proximate cause of an injury. Jacques v. Farrimond, 14 Utah 2d 166, 380 P.2d 133 (1963); Hall v. Blackham, 18 Utah 2d 164, 417 P.2d 664 (1966). Proximate cause is a fact issue and will not, in most circumstances, be resolved as a matter of law. Apache Tank Lines, Inc. v. Cheney, 706 P.2d 614 (Utah 1985).

Causation issues similar to those of this case were addressed by this Court in Godesky v. Provo City Corporation, 690 P.2d 541, 545 (Utah 1984):

> An intervening negligent act [Ainsworth hitting the plaintiff] does not automatically become a superseding cause that relieves the original actor of liability. The earlier actor [City and UDOT] is charged with the foreseeable negligent acts of others. Therefore, if the intervening negligence is foreseeable the earlier negligent act is a concurring cause. (inserts added).

Foreseeability is based upon reasonableness. Schafer v. State Department of Institutions, 592 P.2d 493 (Mont. 1979). As such, it is a jury question. As explained by this Court in Rees v. Albertson's, Inc., 587 P.2d 130, 133 (Utah 1978):

> What is necessary to meet the test of negligence and proximate cause is that it be reasonable foreseeable, not that the particular accident would occur, but only that there is a likelihood of an occurrence of the same general nature. In that connection, it is to be had in mind that the jury is entitled to base its judgment not only upon the facts shown, but to indulge such reasonable inferences as may be fairly drawn therefrom.

The City and UDOT argued in the trial court that it was unforeseeable that Ainsworth would turn into another car on the Overpass and force that car into Lamarr. The question is not

whether it was foreseeable that the plaintiff's friend Don Ainsworth would turn into another car on the Overpass (although Lamarr argues that such traffic accidents are foreseeable on any highway). The question, for causation purposes against the City and UDOT, is whether it was foreseeable that, because of the transient population under the Overpass and the lack of any signs prohibiting pedestrian traffic on the Overpass, a pedestrian, to avoid the transients, might be on the Overpass and get hit by a car. Lamarr argues that such an occurrence was foreseeable and that had proper steps been taken to clean up the transient situation and/or had proper signs prohibiting pedestrian traffic on the Overpass been posted, he would never have been on the Overpass and the accident wouldn't have happened.

In the trial court, the City and UDOT cited Butterfield v. Okubo, 780 P.2d 94 (Utah Ct. App. 1990) to support a legal determination of causation. Butterfield is distinguishable. It was a medical malpractice case where "expert medical testimony must ordinarily be presented in order to establish . . . that the injury was proximately caused by conduct of the doctor." Id. at 96-97. Without that expert testimony, the Utah Court of Appeals held in Butterfield that proximate cause had not been established as a matter of law. No such expert testimony is required to establish causation in this case.

The City and UDOT are free to argue what they will to the jury regarding causation to minimize any allocation of fault attributable to each or both of them. That issue should not,

however, have been decided by the trial court as a matter of law. Proximate causation is a fact issue and should be remanded to the jury. Apache Tank Line, Inc. v. Cheney, 706 P.2d 614 (Utah 1985).

POINT IV

THE CITY'S DUTY TO CONTROL THE TRANSIENT POPULATION UNDER THE OVERPASS IS NOT AN IMMUNE DISCRETIONARY FUNCTION UNDER UTAH CODE ANN. § 63-30-10(1)(a). EVEN IF IT IS DISCRETIONARY, LAMARR IS FREE TO PURSUE THIS CLAIM AGAINST THE CITY

Lamarr does not allege that his injuries arose from police activities, as those activities are defined by the City. The plaintiff filed this claim against the City, alleging negligent maintenance of traffic signs on the Overpass and negligent failure to control the transient problem under the Overpass. Both of these claims deal with the defective, unsafe, and/or dangerous condition of the Overpass. The City's immunity from suit is specifically waived under Utah Code Ann. § 63-30-8 and Utah Code Ann. § 63-30-9 for any injury caused by that condition of the Overpass.

Because immunity for the plaintiff's injuries has been statutorily waived under Sections 8 and 9, that immunity cannot be resurrected under the guise of the discretionary function exception of Utah Code Ann § 63-30-10(1)(a) ("Section 10"). As stated by this Court in Sanford v. University of Utah 26 Utah 2d 285, 488 P.2d 741, 745 (1971):

> Since the waiver of immunity in Sections 8 and 9 encompasses a much broader field of tort liability than merely negligent conduct of employees within the scope of their employment, the legislature could not have intended that Sec. 10, including its exceptions, should

> modify Secs. 8 and 9, even though it be conceded that the negligent conduct of an employee might be involved in an action for injuries caused by the creation or maintenance of a dangerous or defective condition.

That reasoning was recently reaffirmed by this Court in Provo City Corp. v. State, 795 P.2d 1120, 1125 (Utah 1990):

> Nowhere in the act has the legislature given a broad category of activity an immunity that is not qualified by some other part of the act. See Sanford v. University of Utah, 26 Utah 2d 285, 289, 488 P.2d 741, 745 (1971) (even the exceptions in §63-30-10 are subject to the other waivers) (emphasis added).

Those decisions of this Court are why the City's discretionary function argument for "police work" must fail. Even assuming "police work" is involved in this case and that such activity is a discretionary function under Section 10, that conduct is actionable under the specific waiver of immunity in Sections 8 and 9, which overrides Section 10.

Finally, the City cannot avoid its common law duty set out in Point II of this Brief by claiming that its action are discretionary. This was clearly stated by the Kansas Supreme Court in Schmeck v. City of Shawnee, 651 P.2d 585, 594 (Kan. 1982):

> A city's common law duty to keep its streets safe cannot be avoided by alleging the acts were discretionary.

The trial court's conclusion that transient control is an immune discretionary function under Utah Code Ann § 63-30-10-(1)(a) was error. Even if discretionary, the City's actions are not immune because of the specific waiver of immunity of Section 8 and

Section 9, as well as the City's common law duty to Lamarr. This case should be remanded for trial on these issues.

CONCLUSION

Summary judgment on Lamarr's claims against the City and UDOT was improperly granted by the trial court on all issues raised on appeal. That summary judgment should be reversed and this case remanded to the trial court for a jury's determination of those issues.

Dated this 15th. day of March, 1991.

GOICOECHEA LAW OFFICES - WEST VALLEY
Attorneys for Appellant

By: _____
GORDON K. JENSEN

CERTIFICATE OF MAILING

I hereby certify that four true and correct copies of the foregoing BRIEF OF APPELLANT were mailed, first class postage prepaid, to each of the following this 15th day of March, 1991.

Greg R. Hawkins
Assistant City Attorney
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Brent Burnett
Assistant Attorney General
236 State Capitol Building
Salt Lake City, Utah 84114

ADDENDUM

APPENDIX A

27-14-2. Purpose. The legislature recognizes that adequate sidewalks and pedestrian safety devices are essential to the general welfare of the citizens of the state. It is the opinion of the legislature that existing sidewalks within the state, especially in the most populated areas, are not adequate to service the walking public with a result of creating unnecessary hazards to pedestrian and vehicular traffic. It is the intent of this act to provide a means whereby a portion of the funds received by the counties and participating cities as B and C road funds may be used for the construction of curbs, gutters, sidewalks and pedestrian safety devices pursuant to the guidelines set forth in this act. The legislature deems it to be in the best interest of the state if pedestrian safety construction is to be performed on state highways that it be performed under the direction of the counties and participating cities pursuant to rules and regulations of the state Department of Transportation developed in cooperation with the counties and participating cities. It is the further intention of the legislature that the funds permitted to be expended pursuant to this act be deemed additional to funds normally used by counties and participating cities for sidewalk construction and shall not be used in substitution for local sidewalk construction funds.

History: C. 1953, 27-14-2, enacted by L. 1975 (1st S.S.), ch. 3, § 2.

27-14-4. Designated county and city sidewalks — Construction on easements granted by transportation department. (1) All sidewalks, including curbs and gutters within the unincorporated areas of a county and within nonparticipating cities or towns situated within the county, shall be designated county sidewalks. All sidewalks within participating cities shall be designated city sidewalks.

(2) Notwithstanding any other provision of law counties and participating cities may construct and maintain curbs, gutters, sidewalks and pedestrian safety devices adjacent to the traveled portion of state highways upon easements that may be granted by the state Department of Transportation. The state Department of Transportation shall cooperate with counties and participating cities to accomplish pedestrian safety construction and maintenance.

History: C. 1953, 27-14-4, enacted by L. 1975 (1st S.S.), ch. 3, § 1.

Cross-References.
Transportation department, 63-49-1 et seq.

63-30-4. Act provisions not construed as admission or denial of liability — Effect of waiver of immunity — Exclusive remedy — Joinder of employee — Limitations on personal liability.

(1) Nothing contained in this chapter, unless specifically provided, shall be construed as an admission or denial of liability or responsibility insofar as governmental entities or their employees are concerned. If immunity from suit is waived by this chapter, consent to be sued is granted and liability of the entity shall be determined as if the entity were a private person.

(2) Nothing in this chapter shall be construed as adversely affecting any immunity from suit which a governmental entity or employee may otherwise assert under state or federal law.

(3) The remedy against a governmental entity or its employee for an injury caused by an act or omission which occurs during the performance of such employee's duties, within the scope of employment, or under color of authority is, after the effective date of this act, exclusive of any other civil action or proceeding by reason of the same subject matter against the employee or the estate of the employee whose act or omission gave rise to the claim, unless the employee acted or failed to act through fraud or malice.

(4) An employee may be joined in an action against a governmental entity in a representative capacity if the act or omission complained of is one for which the governmental entity may be liable, but no employee may be held personally liable for acts or omissions occurring during the performance of the employee's duties, within the scope of employment or under color of authority, unless it is established that the employee acted or failed to act due to fraud or malice.

History: L. 1965, ch. 139, § 4; 1978, ch. 27, § 3; **1983, ch. 129, § 3.**

Amendment Notes. — The 1983 amendment substituted "chapter" for "act", inserted "or their employees" in Subsection (1), inserted Subsection (2), deleted "gross negligence" before "fraud" in Subsections (3) and (4), and made minor changes in phraseology and style

Cross-References. — Compromise and settlement, § 63-30-18

Payment of medical and similar expenses not admissible to prove liability for injury, U.R.E. 409

63-30-8. Waiver of immunity for injury caused by defective, unsafe, or dangerous condition of highways, bridges, or other structures.

Immunity from suit of all governmental entities is waived for any injury caused by a defective, unsafe, or dangerous condition of any highway, road, street, alley, crosswalk, sidewalk, culvert, tunnel, bridge, viaduct or other structure located thereon.

63-30-9. Waiver of immunity for injury from dangerous or defective public building, structure, or other public improvement — Exception.

Immunity from suit of all governmental entities is waived for any injury caused from a dangerous or defective condition of any public building, structure, dam, reservoir or other public improvement. Immunity is not waived for latent defective conditions.

63-30-10. Waiver of immunity for injury caused by negligent act or omission of employee — Exceptions — Waiver for injury caused by violation of fourth amendment rights.

(1) Immunity from suit of all governmental entities is waived for injury proximately caused by a negligent act or omission of an employee committed within the scope of employment except if the injury:

(a) arises out of the exercise or performance or the failure to exercise or perform a discretionary function, whether or not the discretion is abused, or

(b) arises out of assault, battery, false imprisonment, false arrest, malicious prosecution, intentional trespass, abuse of process, libel, slander, deceit, interference with contract rights, infliction of mental anguish, or civil rights; or

(c) arises out of the issuance, denial, suspension, or revocation of, or by the failure or refusal to issue, deny, suspend, or revoke, any permit, license, certificate, approval, order, or similar authorization; or

(d) arises out of a failure to make an inspection, or by reason of making an inadequate or negligent inspection of any property; or

(e) arises out of the institution or prosecution of any judicial or administrative proceeding, even if malicious or without probable cause; or

(f) arises out of a misrepresentation by the employee whether or not it is negligent or intentional; or

(g) arises out of or results from riots, unlawful assemblies, public demonstrations, mob violence, and civil disturbances; or

(h) arises out of or in connection with the collection of and assessment of taxes; or

(i) arises out of the activities of the Utah National Guard, or

(j) arises out of the incarceration of any person in any state prison, county, or city jail or other place of legal confinement, or

(k) arises from any natural condition on state lands or the result of any activity authorized by the State Land Board; or

(l) arises out of the activities of providing emergency medical assistance, fighting fire, handling hazardous materials, or emergency evacuations.

(2) Immunity from suit of all governmental entities is waived for injury proximately caused or arising out of a violation of protected fourth amendment rights as provided in Chapter 16, Title 78 which shall be the exclusive remedy for injuries to those protected rights. If § 78-16-5 or Subsection 77-35-12(g) or any parts thereof are held invalid or unconstitutional, this Subsection (2) shall be void and governmental entities shall remain immune from suit for violations of fourth amendment rights

APPENDIX B

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IN THE THIRD JUDICIAL DISTRICT IN AND FOR

SALT LAKE COUNTY, STATE OF UTAH

NICHOLAS LAMARR, Plaintiff, v. UTAH STATE DEPARTMENT OF TRANSPORTATION, and SALT LAKE CITY, Defendants.	:	ORDER OF DISMISSAL Civil No: C88-3335 Judge Homer F. Wilkinson

The motions for summary judgment of the defendants Salt Lake City and Utah State Department of Transportation ("UDOT") came on for hearing before the Honorable Homer F. Wilkinson on September 18, 1990. The plaintiff was represented by Gordon K. Jensen. The defendant UDOT was represented by Brent A. Burnett. The defendant Salt Lake City was represented by Greg R. Hawkins. After reviewing the filed memoranda and hearing the arguments of counsel, the Court, in open court, granted summary judgment in favor of the defendants Salt Lake City and UDOT. After the hearing, an Order of Dismissal was prepared by UDOT and submitted to the Court. The plaintiff timely objected to the proposed Order of Dismissal on several grounds. The plaintiff's objections to the proposed

Order of Dismissal were granted by the Court in a Minute Entry received by the plaintiff on November 5, 1990.

Based on that Minute Entry, the pleadings on file, the arguments of counsel, and for good cause appearing, the Court enters the following Order pursuant to Rule 52(a) of the Utah Rules of Civil Procedure:

The Court concludes that the defendant Salt Lake City owed no general duty to the plaintiff for the construction, maintenance or signing of the North Temple Overpass;

The Court concludes that the defendant Salt Lake City owed no private duty to the plaintiff for controlling the transient population under the North Temple Overpass;

The Court concludes that the conduct of the defendants Salt Lake City and UDOT was not a proximate cause of the plaintiff's injuries;

The Court concludes that any duty of the defendant Salt Lake City to control the transient population under the North Temple Overpass is an immune discretionary function under Utah Code Ann. §63-30-10(a);

The Court concludes that the construction, maintenance and signing of the North Temple Overpass is not an immune discretionary function under Utah Code Ann. §63-30-10(a).

Based on these Conclusions of Law, the Court orders as follows:

The motions for summary judgment of the defendants Salt Lake City and UDOT are granted and, based on the grounds set forth in this Order, the plaintiff's complaint against both defendants is dismissed with prejudice.

DATED this 7 day of ~~November~~ Dec, 1990.

BY THE COURT:

HOMER F. WILKINSON
District Court Judge

CERTIFICATE OF MAILING

I hereby certify that a true and correct copy of the foregoing ORDER OF DISMISSAL was mailed to the following, this 19th day of November, 1990.

Greg R. Hawkins
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APPENDIX C

IN THE THIRD JUDICIAL DISTRICT COURT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

* * *

NICHOLAS LAMARR,	:	
Plaintiff,	:	Case No. 880903335 PI
v.	:	Transcript of:
UTAH STATE DEPARTMENT OF TRANSPORTATION and SALT LAKE CITY,	:	MOTION FOR SUMMARY JUDGMENT
Defendants.	:	

* * *

BEFORE THE HONORABLE JUDGE HOMER F. WILKINSON

Tuesday, September 18, 1990

Salt Lake City, Utah

APPEARANCES

For the Plaintiff: GORDON K. JENSEN
Attorney at Law
3540 So. 4000 West, #100
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For the Defendant: UDOT — BRENT A. BURNETT
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REPORTER: SUZANNE WARNICK, CSR, RPR-CM
Official Court Reporter
240 East 400 South, #534
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TUESDAY, SEPTEMBER 18, 1990; 1:45 P.M.

MOTION FOR SUMMARY JUDGMENT

THE COURT: The matter before the Court is the case of Nicholas LaMarr versus Utah State Department of Transportation and Salt Lake City. This comes before the Court on the defendants' Motion for Summary Judgment.

MR. HAWKINS: Greg R. Hawkins for Salt Lake City, your Honor.

MR. BURNETT: Brent Burnett, Assistant Attorney General, for the Utah State Department of Transportation, your Honor.

MR. JENSEN: Gordon Jensen for the plaintiff.

THE COURT: You may proceed.

MR. HAWKINS: All right.

Basically the simple facts in this matter, as alleged in the plaintiff's Complaint, are that their client walked along and crossed the North Temple overpass and ran into some transients, and went to lunch. And when he came back, rather than walk along the sidewalk, the appurtenant sidewalk that's constructed on the overpass on the south side of it, their claim is, rather than run into the transients again, he walked along North Temple. And as he was

walking along North Temple, somebody spotted him, pulled to the right, and forced another car into him and struck him and knocked him off the side of the North Temple overpass, just knocked him off the overpass. He was walking on the roadway as opposed to the sidewalk.

Salt Lake City made a Motion for Summary Judgment. We made one a couple of years ago based on the fact that this was a State-owned road. Mr. Jensen had opposed that. And the Court at that time said, based on the status of the file, you were not going to grant our Motion for Summary Judgment.

Since then the discovery has been done. And the State has admitted, Yes, that's a State road as contained in the State law; and yes, we do have all the maintenance on the road -- the point being Salt Lake City has absolutely no control over that road in any sense of the word. But more particularly, what the current Motion for Summary Judgment is based upon is that Salt Lake City owed no duty to the plaintiff, either for the maintenance of the roadway or for failing to take care of the transient population.

Now, with regard to the maintenance of the roadway, that's done by the State. We have several State laws, 27-12-21, that says, Class A roads are State roads. The State has jurisdiction and control.

27-12-86, which specifically says that the commission has complete jurisdiction and control over the entire right-of-way over State roads in the cities. And 27-12-88, Utah Code Annotated, where it says, where there is no curb, the commission has control over the traveled way, contiguous shoulders and appurtenances.

In this case there is no curb. It's a viaduct with a sidewalk attached alongside the viaduct that rises up and runs just to the south of the roadway.

I assume the Court has read the briefs, so I am not going to address the issues other than to note that it's a discretionary duty. I understand the case I have cited, that the Supreme Court has granted certiorari on that issue. But we think it's appropriate law and good law and in accordance with the way the courts have been ruling in the past with regard to road maintenance.

I wish to call the attention of the Court to the case of Gillman v. Department of Financial Institutions in the State of Utah, which is 782 P.2d 506. It's cited in the brief. But the language I specifically want to call the attention of the Court on is starting on page 512 the Utah Supreme Court said that discretionary immunity is an appropriate immunity, and

then proceeded to quote the California Law Revision Commission and it says,

> "The California Law Revision Commission aptly recognizes this fact in recommending a similar immunity. 'Public entities and public employees should not be liable for failure to make arrests or otherwise enforce any law. They should not be liable for failing to inspect persons or property adequately to determine compliance with health and safety...'"

And then they go through with all these various things.

> "The government has undertaken these activities to insure the public health and safety, to provide the utmost public protection. Governmental entities should not be dissuaded from engaging in such activities by the fear that liability be imposed if an employee performs his duties inadequately. Moreover, if the risk exposure to which a public entity would be subject would include virtually all activities going on within the community, there would be potential for building

defects, for all crimes, and for all outbreaks of contagious disease. No private person is subject to risks of this magnitude." And the Court proceeded to say, "We just do not have liability for those issues."

I have attached a copy of the Ferree v. State to the Court. I think that is -- again, it's Supreme Court law -- it's a very good law. And they are re-emphasizing the fact that the plaintiff must show a duty, a specific duty to the plaintiff as opposed to the public duty. And it's cited in the brief.

I cited the two cases dealing with the deputy sheriff cases that have come up in which the court has specifically held that the sheriff has no specific duty to the individual, and therefore there is no liability. One was for, I think, a burglary case. And the other one, they had pulled an individual over who had been drinking and let him go and he eventually killed himself. And the Court said there is no liability. All the police function is is a general duty.

I point out to you that the issue of transients happens to be a nationwide concern; it is not just local. And the Supreme Court has placed limits on us. We cannot throw a person in jail simply because of

their status.

And secondly, I think the Court can take judicial notice of the fact that the jails are so doggone full, we don't put people in jail for misdemeanors anymore. They have to be fairly serious crimes before the jail will even take them. Thank you.

MR. BURNETT: Your Honor, first may I inquire on the Court, would the Court want to hear both motions, and the motion in which we joined with the city? We have a second motion.

THE COURT: I am inclined to say, argue them both and then let everybody respond.

But any problem with that?

MR. JENSEN: We are obviously going to argue them both today. I was thinking --

THE COURT: I don't care. If you have a preference, say so.

MR. JENSEN: I would just as soon address this motion with Salt Lake City at the point that UDOT's joining in, address that, and then go on to the separate notice of claim issue.

THE COURT: Okay. That makes no difference to me.

MR. BURNETT: As I say, the Court's preference guide my actions.

THE COURT: He expressed a preference.

MR. BURNETT: Certainly, your Honor.

As to the motion we joined in, the facts aren't in dispute. The plaintiff was aware of a walkway that was over part of the North Temple overpass. He used it going in one direction. Concerned over transients gathering where that walkway reached ground on the west said made him then not use the safe walkway provided by the State and designed into the bridge, but instead he walked against traffic. A friend or acquaintance, seeing him walking, tried to pull over towards him, but instead ended up forcing a car in the far lane into the plaintiff.

Your Honor, there can be no proximate cause here. We have not been negligent. We provided a safe access route. The question of illegal transients does not impact on UDOT. Even if the Court were to rule that there were a duty to protect against transients, that would not be the Department of Transportation.

It is not a question that maybe he didn't know about the walkway, which would preclude him from having to walk in the traveled lane. It is clear from the facts in the Complaint he was aware of that walkway and consciously chose to disregard it. The proximate and sole cause of this accident was the acquaintance

pulling out in front of the other vehicle and causing the vehicle to strike the plaintiff who was in the roadway rather than taking the pedestrian walkway which was available.

Also the question of putting up extra signs saying, Please do not use this; use the walkway you are aware of, or such, is all questions of discretionary function, your Honor. While Duncan has a writ granted for certiorari, we feel that the statement in Duncan by the Court of Appeals still is applicable law. It is a restatement of what other courts have said, saying that,

> "Highway maintenance and improvements is predominantly fiscal matters. Every highway could probably be made safer by further expenditures but we will not hold UDOT (and implicitly the legislature) negligent for having to strike a difficult balance between the need for greater safety and the burden of funding improvements."

Yes, maybe we could have bought land, condemned extra property, put a second walkway in. The decision was made to put in the current walkway. It was available. He used it in one direction. Under the discretionary function under the question of proximate

cause, there was no negligence, no liability of the Department of Transportation for this accident, your Honor.

THE COURT: I think you concede first that it is a State road?

MR. BURNETT: Certainly it's a State road.

THE COURT: Do you concede that the State has that responsibility or does the City have that jointly?

MR. BURNETT: Your Honor, for maintenance purposes, it is a State road. And the maintenance of the road, it is not the duty of the City. In fact, I would agree with the City that it does not have the duty to sign or maintain the road.

THE COURT: So the State has that responsibility?

MR. BURNETT: That is the State responsibility. And if the Court were to deny the motions, then I believe the State and the City would be appropriate parties to answer for any alleged negligence to design and maintenance.

There is not a question of maintenance; it is not a question of failure to maintain. It is a question of failure to design or somehow put signs or further appurtenances or failure to make a second safe route for the plaintiff after he felt unsure of himself going

through the transients to use the walkway that was put there for pedestrian traffic.

THE COURT: Of course I ask this question, and I know what your answer is going to be, but when you say -- use the term "discretionary function" as far as the State is concerned and the duty that either they have to the plaintiff himself, is the question of proximate cause a question for a jury or a question for this Court to decide?

MR. BURNETT: In this case, your Honor, it is not a question for the jury, because as a matter of law there is no question that the only sole cause would be the plaintiff placing himself there when he knew there was a pedestrian sidewalk available, and the actions of a third person who caused the accident in what otherwise would not have happened. That, no, your Honor, we feel that is a matter of law. It is not a question for the jury.

As a duty, it is a legal question. Is there a duty to a pedestrian who does not take the pedestrian walkway provided but walks in the traveled portion of the road and is struck by the vehicle, is there a duty to that person by the entity that has created the pedestrian walkway?

There is no duty obviously for the Department

of Transportation to be involved in transient removal. They have no jurisdiction. That is city property as far as the handling of transients.

The duty of the Department of Transportation would be met by providing a safe pedestrian walkway -- safe not from transients or theft, but safe as far as a walkway where they can travel as opposed to vehicle travel. That was done in this case. It was not disputed. It was a walkway. The only question is, the plaintiff consciously chose not to use that walkway.

THE COURT: Thank you, counsel.

MR. JENSEN: Gordon Jensen for the plaintiff.

The facts of this case are correctly stated: That he did go over the walkway which extends halfway over the North Temple overpass. Then there is a stairway that drops pedestrians right underneath the North Temple overpass, right in the heart of the transient population under the overpass. It is not a question of a walkway that extends all the way over and somebody can go over and back along the overpass on a pedestrian walkway. It goes halfway over and drops people down.

What happened on this day is the plaintiff gets on the pedestrian walkway and is dropped down into the middle of a bunch of transients who start harassing

him and bugging him and asking for money and pushing him around. And he leaves and gets something to eat and comes back. And he has to get back over to the hotel he was staying at. He was from out of state.

He was not going to go back into the area he had to use to get into the pedestrian walkway, which was to go back into the heart of where the transients were under the middle of the stairs. He saw no signs prohibiting or excluding pedestrians on the overpass. So he took the appropriate side of the road and started walking over the overpass. He was hit by the car and was hit to the ground below.

Those are the facts of the accident. And the argument that we make is, there may very well be a number of proximate causes to this accident. First of all, I'll argue in order: The general duty alleged, the private duty distinction of the causation issues, and the discretionary function. I'll try and do that pretty quickly.

The general duty of UDOT and Salt Lake City for pedestrian markers and traffic control devices or signs on the overpass was addressed by this Court early on in this proceeding. Back in June of 1988 Salt Lake City filed the same motion they filed here. We don't have any jurisdiction. They cited the code. North

Temple is a State road.

The plaintiff's argument, and the plaintiff's argument was then and it is now, under the statutes of the State, particularly the one cited in the brief entitled 27 specifically dealing with pedestrian safety devices and who has authority or joint authority to place pedestrian safety devices on roadways is shared jointly between UDOT and the participating cities. That's Utah Code Annotated 27-14-2 and 27-14-4.

Our position, as it was at that time, is that the plaintiff is not willing to be governed and I am not willing to be governed by Mr. Burnett's concession that North Temple is a State highway. We have to concede that also. Our position is even conceding that North Temple is State maintained.

These particular statutes as far as safety control devices talk about that this pedestrian safety construction and safety devices are to be performed under the directions of the counties and participating cities pursuant to rules and regulations of UDOT; that UDOT and the participating cities are to cooperate to accomplish pedestrian safety construction and maintenance.

Our argument was at that time and is now that that Motion for Summary Judgment was decided early

on in this case and is the law in this case. There have been no new issues raised. Although we are further along in discovery, there is nothing new offered by Salt Lake City other than their first argument, It's under UDOT's jurisdiction; we don't have anything to do with it.

We addressed those issues and still present the same argument here and say that, under the law of the case doctrine, that issue was decided and shouldn't be decided again. That part of the Motion for Summary Judgment should be denied as it's already ruled on by the Court.

The public/private duty argument very simply is that the plaintiff cannot establish a duty owed to him individually in this case; therefore, the governmental entity does not have any duty to him, and we can't present a prima facie negligence case against them. The distinction is that the public/private duty argument does then apply where there has been a specific waiver of immunity in a governmental immunity statute. And here is how the reasoning goes.

This immunity of a governmental entity is waived for the defective, unsafe condition of a highway, viaduct, overpass, bridge -- like in this case. Governmental immunity is also specifically waived,

meaning you can pursue a claim against these governmental entities, for unsafe or dangerous nature of the structure. We are arguing that it is both a highway viaduct, appurtenance and public structure, that, and under 63-30-8 and 63-30-9 governmental immunity has specifically been waived.

The Governmental Immunity Act states that when immunity is waived, as in this case, that consent to be sued is determined as if the entity were a private person. Courts who have addressed the public/private duty distinction where governmental immunity has been waived have held that the public or the private duty or private duty defense does not apply.

It is pretty clearly stated in the case in the order of the Supreme Court, the case from Brennen v. Eugene cited in the brief.

> "We conclude that any distinction between 'public' and 'private' duty is precluded by statute in this State." Then they cite the Governmental Immunity Act.
>
> "In abolishing governmental tort immunity, the Legislature specifically provided for certain exceptions under which immunity would be retained, and we find no warrant for judicially engrafting an

additional exception onto the statute."

In essence, what happened is the legislature stepped in and said that, In certain cases we are going to let you sue a governmental entity for a dangerous condition of a highway overpass or public structure. To step in with a common law duty doctrine and say, We think we are now going to say that, although the legislature says you are immune, we are going to kind of say you are immune under the public duty doctrine is to judicially appeal the legislative waiver of immunity and say, You are immune; now, we are going to let you sue.

As the cases cited say, that really the public duty doctrine is nothing more than another way of claiming governmental immunity. It says here that in the Arizona Court of Appeals they are saying,

> "The dichotomy of public versus private duty has created more problems than it solved... It's a shield very much like the shield of governmental immunity... And it makes no difference whether we call the remaining shield 'no duty' or governmental immunity."

So we have the legislature saying, You can sue these people for the dangerous and defective nature of the overpass. Then we have them coming back in and

saying, Understand, we are going to basically appeal what the legislature has said and say, You are immune anyway. And that's where the problem arises.

It's the plaintiff's position that in a situation where immunity has specifically been waived by the legislature, where they have said, Under these given circumstances you can sue the government here, that duty is to be determined as if the governmental entity is an individual. Public duty does not apply to individuals, and it would be a repeal basically by the judiciary of the immunity that the legislature has already laid down for this particular case.

There is also one other exception to the public duty doctrine. Even if this Court holds that the public duty defense does apply here, and that is where the statute is specifically designed to protect a circumscribed group of people within the general population, public duty doesn't apply. And that's been acknowledged by the Utah Supreme Court in the Little case.

It's the plaintiff's position that the statute which allows individuals to pursue claims against the government for dangerous and defective highway overpasses, viaducts and bridges is a statute designed to protect a circumscribed group of people

within the general population. Those few people injured by the defective and dangerous condition of highways and other public buildings, that is what that statute and who that statute was designed to protect. And therefore even if a public duty did exist in this case, there is an exception because this statute was specifically designed to protect that group of people within the general population.

So our argument on duty is that the general duty does not apply because that's already been decided on by the Court on the previous Motion for Summary Judgment. And it's for the jury to determine, based on the statutes, who has responsibility there, because the statutes lay on both parties is our position.

On the private duty issue, that private duty doesn't apply where the statute specifically waived immunity. Even if it is a public duty issue, there is an exception because this statute is designed to protect this group of individuals And Nick LaMarr, the plaintiff in this case, is a member of that specified group of people to be protected by that statute.

On the proximate cause issue -- I'll be brief here -- it's like UDOT and the City are arguing, that there can only be one proximate cause to an accident. And it's not true. Our position is that, obviously the

guy who drove in and knocked the plaintiff over off the overpass is negligent. And we believe they can argue to the jury all they want that, This negligence kind of intervened into our conduct and we are not responsible.

Our position is that Nick LaMarr never would have been on the overpass if these defendants had fulfilled their duty and obligation to the plaintiff by properly marking the overpass to exclude pedestrian traffic, which it didn't do, and by clearing up the transient population under the overpass where he would have been able to go back and get back up on the pedestrian walkway but didn't.

As stated by the Utah Supreme Court in the Godesky case, it's a question of foreseeability.

> "The intervening act" -- which is the car hitting the plaintiff and knocking him off the overpass -- "does not automatically become a superseding cause that relieves the original actor of liability. The earlier actor" -- our argument is the failure of the City and UDOT to properly mark and control the transients -- "is charged with the foreseeable negligent acts of others. Therefore, if the intervening negligence is foreseeable, the earlier negligent act is a

concurring cause."

Our argument is traffic accidents on highways are foreseeable, particularly knowing the transient problem. And particularly it would be foreseeable that someone would get up on the overpass and get hit. Proximate cause is an issue for the jury.

The Butterfield case that was cited as supporting a legal determination of proximate cause was a medical malpractice case where the court determined that expert testimony was necessary to establish causation. And because the affidavit submitted wasn't sufficient to establish medical causation, they could rule as a matter of law that there was no connection, no causal connection between the alleged malpractice and the injury to the plaintiff. That's not the case here.

While there may be expert testimony necessary to establish liability in this case, or duty, or what they should have done, to establish causation as to whether their actions contributed to the plaintiff's injuries is not a matter that requires any expert testimony. Proximate cause being a jury issue, this Motion for Summary Judgment should be denied.

And the final thing -- I'll be brief -- is on the discretionary function. The Utah Supreme Court has said again and again that marking and signing of a

highway is a governmental function, but it is not a discretionary function within 63-30-10 of the Governmental Immunity Act. I think it was best stated by the Utah Supreme Court in Richards v. Leavitt.

> "The maintenance and repair of traffic signs is a governmental function for which immunity from suit has been expressly waived and which is not within the discretionary function exception."

Now, the Duncan case and Gleave case on railroad crossings and UDOT's responsibilities at railroad crossings, we submit they are distinguishable. They are different cases. The cases that deal specifically with highways say, It is not within the discretionary function exception.

Finally, as far as the police activity goes, the plaintiff doesn't argue that his injuries were caused by the kind of police activities that the City alleges, really failure to arrest or letting go a parole person or something. What our argument is simply was that the City was negligent in allowing the transients to continue to congregate under the overpass, and that created a defective and dangerous condition of a public structure. That is our claim of negligence.

Only after we asked them to identify who can

testify, who has knowledge about the transient problem, they identified some police officers. That's the first time the police department got involved. They have officers or the people with knowledge of that problem. And perhaps within the department, the police have the responsibility for monitoring that situation.

Our position is that under the express waiver of immunity of 63-30-8 and -9, we pursue this claim. And discretionary function of 63-30-10 cannot be used to override the specific waiver of immunity of 63-30-7 and -8 and -9.

The last quote is Sanford v. University of Utah.

> "Since the waiver of immunity in Sections 8 and 9 encompasses a much broader field of tort liability than merely negligent conduct of employees within the scope of their employment, the Legislature could not have intended Section 10" -- the discretionary function section -- "including its exceptions, should modify Sections 8 and 9, even though it be conceded that the negligent conduct of an employee might be involved in an action for injuries caused by the creation or maintenance of a dangerous

or defective condition."

The bottom line being where the legislature has specifically waived immunity for defective and dangerous condition of a public highway, that discretion of a discretionary function cannot be used to override that specific waiver of immunity. That is what the Stanford court is saying.

Based on all of those arguments, it's our position that all points in Salt Lake City's Motion for Summary Judgment regarding general duty, private duty, causation and discretionary function for both highway maintenance and police activity have to be denied.

THE COURT: What will you be doing with the Ferree case?

MR. JENSEN: Well, as I said, I believe the Ferree case acknowledges that you establish a private duty. If's our position that the discretionary function exclusions, number one, that the Governmental Immunity Act applies, and there has been a specific waiver of immunity as there has been in this case, as specific to Section 63-30-8 and -9. It's my understanding that those specific waivers of immunity were not raised in the Ferree case. Where there is a specific waiver of immunity that the legislature has put into the statute, that the private duty distinction does not apply as it

does in this case.

THE COURT: Thanks.

MR. HAWKINS: Your Honor, very briefly.

I think a check of the minute entry in the file shows that the Court's intent was to do that without prejudice, because your minute entry says, "Based on the state of the file at this time." But in any event, I will call your attention to page 152 of the Ferree case in which the Supreme Court said, quote -- talking about sovereign immunity in Section III of the opinion. It says,

> "Having decided that the defendants owed no duty of care towards the victim, we need not reach the questions raised by the doctrine of sovereign immunity. Some courts, including this Court, have addressed the liability of a corrections department solely on the question of sovereign immunity.
>
> "Sovereign immunity, however" -- going to page 153 -- "is an affirmative defense and conceptually arises subsequent to the question of whether there is tort liability in the first instance. There is sound reason and desirable simplicity in analyzing

and applying negligence concepts before deciding issues of sovereign immunity."

Then it quotes the Supreme Court of California, who happens to quote Professor Van Alstyne.

"Some cases represent an unnecessary effort to categorize the acts or omissions in question as immune discretionary functions, when the same result could be reached on the ground that the facts fail to show the existence of any duty owed to the plaintiff."

Specifically the Supreme Court has said in our State when you first look at whether or not there is a duty before you ever look at whether or not there has been any waiver of sovereign immunity, that's what Ferree specifically says. So as far as they're concerned, governmental immunity is not a judicial waiver of immunity. The courts are saying you have to look at a specific duty first.

It's not a novel concept. It's one of these things where I suppose, because of governmental immunity, the growth of common law and definition of duties has been stunted. And now with the waiver of governmental immunity, the courts are beginning to look at things. And everybody is saying, Oh, waiver of

governmental immunity; the government has to pay now. And the court says, Wait a minute; you look at duty. You first have to find a specific duty.

Beach v. University of Utah, the case where the student from the University of Utah is on a field trip and ends up being found dead in the morning. And they are saying, Hey, so she drank a lot of alcohol. And the Court said there is no specific duties that the University of Utah owed to that student who was on a mandatory field trip in order to get credit for that class. You know, to me, how much closer to a specific duty can you get? And yet the Supreme Court said that's not enough.

In this case we have one person in the general population who goes and eats dinner and decides, I am going to walk along the roadway and not walk along the walkway. There is no specific duty owed to him. There is only a general duty. The statutes he has cited give absolutely nothing but are saying, Hey, you cooperate for the safety of people, fine. We cooperate for the safety of all people.

But the area they are specifically concerned about has a specific statute that says that the State is responsible for the appurtenant structures where there is no curb. We are not talking about the place where

the State is responsible for the road fromthe back of a curb to across the lanes to the back of the next curb. That's not what we are talking about. We are talking about a structure where there is no curb, where you have a sidewalk along a structure.

And the State law says, that it is the State's liability with regard to controlling transients. It's tough to control transients. The argument can be made for the group of, for example, a Jewish person who walks past, or a colored person who walks past the Ku Klux Klan and is attacked. And we are saying, Hey, you should have stopped them from gathering. Sometimes you have no idea what's going on. The same thing is true if a Jewish person is attacked by a group of people in society, the same thing as here.

The police and the City are bound. We cannot arrest an individual unless there is probable cause to show that he has committed a crime, and a misdemeanor has to be committed in the officer's presence.

How on earth can we go in and violate all these people's rights who have the right to congregate as long as they do so peacefully and yet protect the people who happen to get in the midst who this group of people doesn't particularly like, whether they be Whites, Black, Jews, you name them -- for that matter,

the Arabs walking in a Jewish community nowadays.

What we are saying is, there is a general duty. We'll do what we can with a general duty. And when there is a specific duty, we'll take care of the issue. But we cannot go in wholesale and arrest people because it violates their civil rights. Thank you.

THE COURT: Before you sit down, on this question of duty as far as the highway is concerned.

MR. HAWKINS: As far as the highway is concerned, I'm not sure, getting into the special duty. And if you take the Supreme Court to the extent that the Ferree case says that it should go, coupled with the Beach case, I suppose you can say there will never be a specific duty unless a public official happens to spot the problem and fails to intercede and solve it right then immediately. I am not sure I can give you any kind of a specific time when a private duty doctrine would exist. I'm sure if I were imaginative enough, I might come up with one.

But I will suggest that the Ferree case puts a big burden on the plaintiff's case to do that. But they have not shown any steps to show that the duty was owed by the City as to that, absolutely none. And I think that's the kind of obligation to place the City in a specific duty to an individual, and not for me to

generate out of a whole mass an area where one might occur. But they have not done so.

THE COURT: And do you base that on strictly the concept of curb to curb?

MR. HAWKINS: Well, what they are talking about is where the State has -- he is talking about the statute where it says the State and the City cooperate. Okay? The law on the State -- and I don't happen to have the thing here. But if you have a Volume 27, I'll be happy to point it out for you. For example, on State Street, which is a State road, the State maintains it from the back of the curb across the lanes across the median and across the lanes to the back of the other curb. The sidewalk is maintained by the City. And we cooperate, even though the whole right-of-way is a State right-of-way.

In this particular case, that's not what we are talking about. We are talking about North Temple which comes, and instead of having sidewalks that walk along, it crosses the railroad tracks. You have the viaduct which rises over the tracks to allow the trains through. And in those instances the law that I cited to you specifically says, Where there is no curb involved, it is the State's responsibility to maintain the roadway and all appurtenant structures including the sidewalk

that is built there.

And it is true that the sidewalk does not drop all the way down to where the road starts to rise. But it is also true that that sidewalk comes all the way down and drops in to a sidewalk that is completely safe. In fact, there is nothing wrong with the concept of the sidewalk at all. What they are claiming is wrong is that their client was hassled by transients, went and ate dinner, didn't check if the transients were there, didn't do anything. He just decided to walk on the roadway.

MR. BURNETT: Your Honor, clarification.

The Governmental Immunity Act does not waive all other immunities or defenses that there might exist. Indeed, Section 4 of the Act expressly retains and says, This Act does not do away with any other state or federal law that might grant some kind of immunity or defense to this state. And for that reason the idea of duty is operable.

I think all the other parts, indeed part of the negligence, itself, is having to show that duty of care plus the breach thereof to show someone is negligent. But leaving duty, your Honor, I think that counsel has already said what needs to be said there.

As to the question of the allegation of

defect, the plaintiff has said that it's defective because there are transients underneath where the walkway reaches the earth and goes to a sidewalk. Well, your Honor, that's not a defect of the structure. That might be a concern. But that's not a defect that the Department of Transportation can be implicated for.

The Department of Transportation has never been claimed by anyone to have police powers to seek to attempt or force people to move on from land or property. It cannot be held the fault of the UDOT that there might have been transients that congregated underneath the North Temple overpass at the place where the pedestrian walkway reached the ground.

But also, your Honor, all the allegations about the exceptions, the waiver that avoids discretionary function have one defect. The case cited by the plaintiff, I can cite another one, Bigelow v. Ingersoll, where they found negligence there was no discretionary function. We are not in a position of putting new, greater, a larger amount of traffic control devices or signing, but the question is of maintenance and repair of existing signing.

And we would agree that this is a case where certain signs have been placed and certain control devices have been placed. And if there was an auto

accident, that would be a position that was not a discretionary function but a position to put a sign, to put further traffic control devices. That is a question of discretionary function and is not a defective maintenance and repair question.

That's what we have here. There has been no allegation that certain signs or control devices that would preclude plaintiff from deciding not to use the walkway but walk in a lane of traffic were there at one time and through our negligence are no longer there. It's a question of discretionary decision as to what to put, what traffic control is necessary, not a question of repairing or maintaining something already in place.

THE COURT: What duty do you claim the State has to the plaintiff in walking not on the sidewalk but in the roadway?

MR. BURNETT: Your Honor, to look at it, I would think -- I would say that the normal traveling public there is some duty there. We have not defined exactly what it is yet by court case. But I would envision there is no duty to someone who is not traveling in accordance with normal pattern where there is a public, open walkway away from the traffic. If that had been designed faultly so that cars crashed into it or the ground gave up and gave way and he fell

through the walkway, there would be a different question. But I don't believe there is a duty held to a person who consciously knows of and disregards the pedestrian walkway available and chooses to take the vehicular route. It would have to be outside the duty of UDOT to anyone.

MR. JENSEN: Can I say two things, Judge?

THE COURT: This is their motion. If I let you, I am going to give them the right to respond if they want to. But if you want to go ahead, I am not that rushed.

MR. JENSEN: I just want to clarify one thing. Our position is that when immunity is specifically waived under the statute by the express terms of the Governmental Immunity Act, the governmental entity is treated as though it were an individual, and that the public and private duty distinction is not available as a defense to an individual as stated by the court that we quoted before. Where there is no immunity, the state is to be treated as a private litigant, and that's specifically the Governmental Immunity Act. To allow the public duty doctrine to disturb this quality between plaintiff and defendant would create immunity where the legislature has not. That's the difference.

And that's were the Ferree case doesn't apply here, because we are dealing with a defective and dangerous condition of a highway, or immunity has been specifically waived. And that's why the public defense doesn't apply.

It's our position that these people -- Mr. Hawkins stands up here and says, How can we guard against everything? Who knows what's going to go on down there? They knew what was going on underneath there. The question was, what they did, was that reasonable under the circumstances to fulfill their duty to the public to prevent against that dangerous condition? And that's a fact question. To say, We didn't know what happened, and, How are we ever going to know, certainly doesn't comport with the facts of this case where deposition testimony has shown that they knew for a long time before this accident ever happened what the problem was and what was going on underneath there.

We claim that the negligence of UDOT is in failing to sign and appropriately exclude pedestrians from the overpass and that that created a dangerous and defective condition. And again, the immunity has been specifically waived for that condition, and that the public or private duty dichotomy and defense doesn't apply in those circumstances.

And I guess I should, just because I mentioned that -- no additional legal argument, I promise -- I just want to move to publish because I didn't file a specific motion to publish the deposition of Norm Thompson who is a police officer we deposed and is mentioned in the brief. I don't think the original has been circulated. But I move to publish Norm Thompson's deposition in conjunction to these motions.

MR. HAWKINS: I have no objection to that. And if you would like, I have a copy of the deposition.

THE COURT: It may be published.

MR. BURNETT: Your Honor, I will be brief. I will be speaking for myself and Mr. Hawkins.

Very quickly, any case of forgetting sovereign immunity completely requires a duty of care found by the court that there be a breach. It's not a question of public or private duty being done away with. Sovereign immunity, as the court said in Ferree, it's a separate issue. Was there a duty of care such that the public entity can be found to be negligent? Did they owe that duty? It's not a question of immunity at all. It's a separate, distinct question of negligence. Was there a duty?

THE COURT: Well, let me rule. And let me indicate to you I have spent considerable time reading

the memorandums. And of course motion for summary judgments can be very summary sometimes, and they are something the Court tries to consider all things and hopes that they are considering all the law and being fair to all parties concerned.

But the Court is of the opinion that, even though sovereign immunity has been alleged and it does come into play here, that you cannot ignore the basic tort doctrines, negligent doctrines that you must look at with the sovereign immunity. I am of the opinion and I so rule that the City, which also involves the State, that it is a discretionary function as far as the police activity in controlling the transient activities. And I don't think that the State or the City had a specific duty to the plaintiff in this case as far as controlling of those activities are concerned. And I rule in favor of the defendants on that.

The Court is also of the opinion -- although I think this gets into a tougher decision, and that's the question of the maintenance of the highway. I don't think it's the proximate cause. And I will acknowledge that the proximate cause is a jury question in most situations. But I don't think here in this situation -- I think the plaintiff has failed to show a proximate cause as far as the causation of this accident. I don't

think that the City and the State had a duty towards that individual. It was a situation of where he chose to place himself.

I don't think it's a discretionary function as far as the signing of the highways are concerned. I think once a highway has been signed, that it's something that if it's been done in a negligent manner, then I am of the opinion that that could go to a jury. But I am not persuaded here in this situation that there was any duty to this individual to post any sign for him not to walk on the roadway.

And also, as I say, the plaintiff failed to show a proximate causation as far as the injuries are concerned in this Court's mind.

And based on that, I don't know if it's necessary for me to rule further.

MR. JENSEN: Can I just get a clarification, Judge, on the no duty to sign the road. Is that based upon a general duty or is that specifically based on the public/private duty issue that was raised?

THE COURT: I don't think that the State has any specific duty to an individual to sign that road, nor do I believe there is a general duty to the public to sign that road, not to walk on the road.

I am also of the opinion here, and I have not

gone back and reviewed everything of which I did back before, but generally when summary judgments come of that nature that soon in a case, I give time for discovery. And of course I don't think it makes any difference to the plaintiff here. He has, I guess, two deep pockets.

But I am of the opinion that the City does not have a responsibility in that situation. I think they have the statute of joint responsibility in some areas, but not in the area of this as to what is alleged as took place.

MR. JENSEN: I probably won't address my motion for separate trials then.

THE COURT: That may be moot. Do you want to address the area as far as the immunity statute you raised?

MR. BURNETT: Your Honor, with the understanding that the case is being dismissed in toto, I don't believe that would be necessary. If plaintiff decides to appeal, I have the right to bring that and raise that issue on appeal at that time if needed as a fallback position. But the Court has already ruled.

THE COURT: And that's probably true.

MR. JENSEN: I am not asking for a ruling on those issues.

THE COURT: If there is no further questions, then the Court will be in recess.

MR. HAWKINS: Thank you, sir.

MR. BURNETT: Your Honor, should I prepare the order for that?

THE COURT: If you would please.

(This concludes these proceedings at 2 35 p.m)

* * *

C E R T I F I C A T E

STATE OF UTAH)
:
COUNTY OF SALT LAKE)

I, SUZANNE WARNICK, CSR, RPR-CM, do certify that I am a Certified Shorthand Reporter, Registered Professional Reporter with the Certificate of Merit, and Notary Public in and for the State of Utah.

That at the time and place of the proceedings in the foregoing matter, I appeared as the court reporter in the Third Judicial District Court for the Honorable Judge Homer F. Wilkinson, and thereat reported in stenotype all of the proceedings had therein;

That thereafter, my said shorthand notes of the Motion for Summary Judgment were transcribed by computer into the foregoing pages; and that this constitutes a full, true and correct transcript of the same.

WITNESS MY HAND and official seal at Salt Lake City, Utah, this 9th day of January, 1991.

Suzanne Warnick, CSR, RPR-CM

NOTARY PUBLIC
SUZANNE WARNICK
STATE OF UTAH

My commission expires:
1 April 1991.